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Abstract

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Keywords

obligations, under, convention, rights, child, fulfilment, juvenile, vietnam, establishment, courts

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The Establishment of Juvenile Courts and the Fulfilment of Vietnam's Obligations under the Convention on the Rights of the Child

PHAM, Thi Thanh Nga*

Abstract

This article situates child protection by Vietnam's judicial bodies in relation to the requirements of the Convention on the Rights of the Child and other international instruments in juvenile justice. It demonstrates that Vietnam's legislation and practices do not fully comply with international standards and that there remains a significant gap between the letter of the law and its implementation. The party - government policy on judicial reform, however, creates the potential for establishing juvenile courts in Vietnam.¹ The feasibility of such juvenile courts, and the implications for Vietnam meeting its obligations under the Convention, are also surveyed.

Vietnam is a socialist, developing country in South East Asia. It was the first country in Asia and the second in the world to ratify the Convention on the Rights of the Child (CRC) in 1990. Vietnam has made remarkable achievements in promoting children's development. However, there are still many Vietnamese children involved in judicial proceedings as juvenile offenders, child victims or witnesses, especially those living in difficult circumstances without the kind of support contemplated in the CRC. This means that Vietnam has not yet fulfilled its responsibilities as a signatory to the CRC.

Improving the protection of children in the judicial sector is the duty of those with responsibility for the care of children and also for Vietnam's legislature, policymakers and judicial agencies. The question of establishing juvenile courts instead of regular courts to handle juvenile cases is now being publicly discussed in Vietnam. After looking at the history of juvenile courts in an international context, and considering

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¹ The Communist Party of Vietnam is the leader of state and society in Vietnam (art 4 of the Constitution of 1992). It controls judicial activities and judicial bodies as other state bodies over politics, organisation and personnel (art 41 of the Status of the Communist Party of Vietnam; part II/2/8 of Resolution No 08-NQ/TW: part II/B/8; Resolution No 49-NQ/TW). On the topic of judicial and court reform, some authors propose the elimination or reduction of the one-party dominance in the courts, see: Shapiro, 2008: 327-335; Harding and Nicholson, 2010: 8; Nicholson and Duong, 2010: 31-33; while To (2006: 456) concludes that the Party's leadership, in principle, does not contradict judicial independence. I do not focus on this issue in this paper, using the Communist Party of Vietnam's resolutions as an important source in understanding the justice system. From the viewpoint of cultural diversity whereby it is argued that the implementation of international human rights treaties should take place in the context of the economic, social, and cultural conditions prevailing in each member state (see Beijing Rules: 1.1; Riyadh Guidelines: 8), the specific local situations of Vietnam and the one-party state need to be kept in mind.

the implementation of the rights of the child in the judicial sector in Vietnam, I will argue that it is feasible to establish juvenile courts in Vietnam.

The first juvenile courts² were introduced in Australia, the United States of America (US), the United Kingdom and Canada between 1895 and 1908 (Muncie and Goldson, 2006: 197; Cunneen and White, 2007: 13–14). Since then, there has been uneven development, with juvenile courts swinging between toughness and permissiveness in the treatment of juvenile offenders (Champion and Mays, 1991; Hinton et al., 2007: 473; Junger-Tas, 2009: 225; Miller, 2009: 178). Two typical models are the welfare model, which focuses on treatment and rehabilitation, with specialised juvenile judges having wide discretionary power to help children; and the justice model introduced in the 1970s, which focuses more on offences and action based on the three principles of ‘just deserts’, ‘proportionality’ and ‘equality’ (Champion and Mays, 1991: 38; Junger-Tas, 2009: 227–229). There have also been debates on the effectiveness of, or possible abolition of, juvenile courts. Despite this, many see juvenile courts as necessary for effectively dealing with children in contact with the justice system (Freiberg, 1993: 261; Kopecky, 1994: 34; Kerbs, 1999: 120–121; Slobogin and Fondacaro, 2009: 62).

The trend of developing juvenile courts has become more prominent since the implementation of the CRC in 1990. In its observations on the implementation of the Convention, the Committee on the Rights of the Child (CORC) encourages state parties to create or strengthen the juvenile justice system and, in particular, specialised courts for children. Although some countries pay little attention to this matter (United Nations Office on Drugs and Crime, 2006: 1), juvenile justice and juvenile courts have been receiving more support. Their aim is the rehabilitation and social reintegration of children (CRC, art 40(1)). This requires the concurrent application of various measures for the prevention of juvenile delinquency; diversions; restorative justice; guarantees of a fair trial; and support for recovery and social re-integration.

As a CRC signatory, Vietnam is obliged to develop a comprehensive policy for juvenile justice with attention paid to juvenile offenders, child victims and child witnesses. In this article I focus on whether juvenile courts would allow Vietnam to better implement its obligations to protect children involved with the justice system. In doing so, I review international standards in juvenile justice and examine Vietnam’s obligations in the judicial sector as a signatory to the CRC and their implementation. I argue for the establishment of a specialised juvenile court in Vietnam and predict its possible effects.

The CRC and International Law on Children’s Rights

The CRC was adopted in 1989, and entered into force in 1990. It contains a preamble and 54 articles with basic principles and particular rights covering all aspects of children’s lives. The CRC embraces in one instrument ‘the whole gamut of human rights’ for children: all economic, social, cultural, civil and political rights (Mower, 1997: 6; Abramson, 2009: 157).

The CRC was accepted quickly. The United Nations (UN) database reveals that 193 countries have ratified the CRC, that is, all signatories except the US and Somalia.³ All the state parties have legally binding obligations to undertake all appropriate measures to realise children’s rights (CRC, art 4). The CRC has

² Juvenile courts are also sometimes called children’s courts or youth courts.

³ These nations have signed but not ratified the CRC, see <http://www.treaties.un.org/>.

therefore become the universal standard in human rights for children and the benchmark for assessing states parties' responsibilities in ensuring the rights of children in their jurisdiction. It has similar authority in the academic field. Alanen (2010: 6), for example, recognises that studies on the rights of the child may be [different in some ways, with some focusing on specific aspects of the rights or on the practical implementation in different places of the world](#), but share the same approach: 'children's rights are assumed straightforwardly to be those enshrined in the CRC'.

The CRC devotes considerable attention to the judicial sector. The specific rights of children in contact with the justice system are specified in arts 37, 39 and 40. Children in conflict with the law have the same basic rights as any other offender, including to have legal assistance; to be presumed innocent until proven guilty; not to be compelled to confess guilt; and not to be subjected to torture or inhuman treatment. Special rights arising from their non-adult status are not to be sentenced to capital punishment or life imprisonment; to be treated in a manner appropriate to their age and well-being; and to have their privacy fully respected at all stages of proceedings. The CRC requires the state to establish a minimum age of criminal responsibility; to hold children in detention only as a measure of last resort and for the shortest period of time; and to apply all appropriate measures to promote child victims' recovery and social reintegration, to foster their health, self-respect and dignity.

These provisions set out central standards for the rights of child offenders and victims but these standards need to be understood in the context of both the principles and other articles of the CRC and the larger context of human rights. International human rights law provides numerous guidelines, rules and principles focusing on juvenile justice. These specify standards or provide practical guidance for the implementation of the CRC in more specific areas. Based on the subject and scope of the law, these international instruments relevant to juvenile justice can be divided into three groups.

The first concerns children in conflict with the law or at social risk and they guide the prevention and deprivation of liberty of child offenders. They include the UN Standard Minimum Rules for the Administration of Juvenile Justice of 1985 (Beijing Rules); the UN Guidelines for the Prevention of Juvenile Delinquency of 1990 (Riyadh Guidelines); and the UN Rules for the Protection of Juveniles Deprived of their Liberty of 1990 (Havana Rules). These three documents are also known as 'UN Standards and Norms in Juvenile Justice' (Guidelines for Action on Children in the Criminal Justice System: par 3).

The second group is concerned with child victims and witnesses, including the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000.

The third group provides common guidance for working with children in contact with the justice system – covering juvenile offenders, child victims and child witnesses. It consists of the Guidelines for Action on Children in the Criminal Justice System of 1997; General Comment No 10 (2007) on Children's Rights in Juvenile Justice; and General Comment No 12 (2009) about the Rights of the Child to be Heard.

Despite their differences, these instruments are interdependent and together establish common standards for protecting children in justice. The CRC imposes

legal obligations on its 193 states parties, while the others provide guidance, details or supplements.

Besides child-specific documents, many other human rights treaties also contain provisions especially applicable to children. These include documents recognising the rights of every person, either in general or in certain areas, for example, the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. Other treaties deal with the rights of people in special circumstances in evolving criminal justice systems, or who are victims of crime or power abuse, such as the Standard Minimum Rules for the Treatment of Prisoners; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Standard Minimum Rules for Non-custodial Measures; and the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.

Though these non-child-specific treaties are not as relevant as the child-specific instruments, they provide the direction and clarification of relevant issues.

The Implementation of the CRC in Vietnam

Vietnam signed and ratified the CRC in 1990 without any reservations. In 2001 Vietnam also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography. Vietnam has made efforts to implement its obligations. The government has, for example, stated that the care and protection of children is a national tradition and a consistent policy and that ‘implementing child rights is one of the focuses of human rights in Vietnam’ (Vietnam, 1999: 66). Ten years ago, when human rights was still quite ‘sensitive’ in Vietnam, the subject of children’s rights gained a certain respectability, creating ‘catalytic’ effects on the promotion of human rights in general (Salazar-Volkman, 2004: 5).

Numerous domestic laws regulating children’s rights and the responsibility for child care and protection have been adopted, such as the Law on Child Protection, Care and Education of 1991, 2004; the Law on Universal Primary Education of 1991; the Penal Code of 1999, amended in 2009; the Criminal Procedure Code of 2003; the Law on Adoption of 2010; and the Law against Human Trafficking of 2011. In addition, many national programs for children have been conducted, including the National Action Program for Vietnamese Children for the periods 2001–2010 and 2011–2020; the Program for Children in Difficult Circumstances for the period 1999–2002; and the National Program on Child Protection for the period 2011–2015.

The state agencies responsible for child welfare have also changed over time. The Committee on Adolescents and Young Children was established in 1989 with the expectation of enhancing the education and care of children, but no officer was appointed to work full time on the Committee’s functions. One year later, when Vietnam signed the CRC, this Committee was renamed the Committee for Child Protection and Care with an extension of its functions and specialised staff. Since 2007, the main responsibility for child protection and care has belonged to the Ministry of Labour, Invalids and Social Affairs, according to Decrees No 186/2007/ND-CP and 106/2012/ND-CP.

In terms of reporting to the CORC, Vietnam submitted five national reports on the implementation of the CRC between 1993 and 2012, and a report on the implementation of the two optional Protocols in 2006.⁴ It also answered numerous

⁴ Since 2006, reports on the implementation of the two optional protocols have been included in reports on the implementation of the CRC, see [Vietnam, 2008](#); [Vietnam, 2012](#).

questions posed by the CORC, including 10 questions concerning the implementation of two protocols on the sale of children, child prostitution and pornography and 20 questions about the implementation of the CRC in the period 2002–2007 (COCR, 2006; 2012).

The life of Vietnamese children has generally improved in every aspect since Vietnam's ratification of the CRC, and this progress has been acknowledged by the international community. The COCR attests that Vietnam has achieved progress in implementing the Convention (2003: pars 3–5; 2012, pars: 3–6). UNICEF (2011: 17), recognising that Vietnam 'has continued to demonstrate visible and forward-looking leadership for its approximately 30 million children ... and has made tremendous progress for its children in a remarkably short period of time'. Nevertheless, many children in Vietnam still live in conditions of deprivation and exclusion (UNICEF, 2011: 17). Laws concerning children are formulated in various legal documents, sometimes with a lack of coherence and clarity (UNICEF, 2011: 255). This is said to be a common shortcoming of Vietnam's legal system (Inter-Agency Steering Committee for Vietnam's Legal System Development Needs Assessment, 2002: 15). The Vietnamese Government has acknowledged that its legal system still contains inconsistencies, overlaps and contradictions at several points, and that there are gaps between legislation and enforcement (Vietnam, 2009: 10; Le, 2010: 82). The COCR has also made recommendations for the mitigation of the negative impact of economic reforms on vulnerable groups; reform of the juvenile justice system; the establishment of an independent inspection agency; the collection of sufficient data related to children; and the dissemination of the Convention (COCR, 1993; 2003; 2012).

In short, although children's rights have been improved in many ways since the ratification of the CRC, Vietnam has not yet fully satisfied its obligations under the CRC with respect to the protection of children in contact with the judicial system. This will now be discussed in more detail.

Juvenile Justice in Vietnam

Under Vietnamese legislation, 'adult' refers to a person aged 18 years old or older, in line with international law. However, 'children' (*tre em*) are defined as people below 16 years old (Law on Child Protection, Care and Education, art 1). This is different from the international standard, which defines children as below 18 years old (CRC, art 1). The Law refers to people under 18 years old as 'juveniles' (*nguai chua thanh nien*) (Civil Code, art 18), which covers two groups, children (aged below 16) and people aged between 16 and 18. 'Child/children' is usually used in legal documents where children are considered as subjects of care, protection and education. 'Juvenile(s)' is frequently employed in documents indicating juveniles' rights and duties when they are parties to contracts or subjects of the law in specific situations, such as the violation of law or breach of the peace.

In the judicial sector, the minimum age of criminal responsibility is 14. Persons aged a full 14 years or older, but below 16 years old, bear penal liability for very serious crimes intentionally committed or for particularly serious crimes.⁵ Persons

⁵ According to art 8(3) of the Penal Code, 'less serious crimes' are crimes that cause 'no great harm to society' and the maximum penalty for such crimes is three years of imprisonment; 'serious crimes' are crimes that cause 'great harm' and the maximum penalty for such crimes is between three and seven years of imprisonment; 'very serious crimes' are crimes which cause very great harm and the maximum penalty for such crimes is between seven and 15 years of imprisonment; 'particularly serious crimes' are crimes which cause 'exceptionally great harm' and the maximum penalty for such crimes is over 15 years of imprisonment, life imprisonment or capital punishment.

aged a full 16 years or older bear penal liability for all crimes they commit (Penal Code, art 12).⁶ Adult offenders can be sentenced to the death penalty or life imprisonment but these punishments can not be imposed on juveniles. The penalties imposed on juvenile offenders are lighter than those imposed on adult offenders for the corresponding crimes (Penal Code, arts 69, 72–77).

At present, Vietnam has neither a juvenile code nor a separate court system for handling juvenile cases. The legal documents and authorities responsible for solving crimes committed by either adults or juveniles are the same. Vietnam's court system is divided into three levels: the Supreme Peoples' Court; provincial-level courts; and district-level courts.⁷ When an offender is brought before the court, that person shall be tried by a district court or a criminal court (a department in the provincial court), depending on the nature and degree of crime committed.

In Vietnam, all criminal offences and criminal penalties must be prescribed in the Penal Code (art 2); and the Criminal Procedure Code stipulates the procedures for the settlement of criminal cases (Criminal Procedure Code, art 1). Together, the Penal Code and Criminal Procedure Code create the primary legal basis for solving crimes, as well as protecting human rights in the justice system, including the rights of juvenile offenders, and the rights of child victims and witnesses. Each of these Codes devotes a chapter to juvenile offenders as distinct from adults. However, there is not much difference between the regulations applicable to child victims and witnesses compared with those of adults. Only a few articles of the Criminal Procedure Code contain provisions concerning these subjects.

Drawing on international standards in juvenile justice, Vietnamese legislation has introduced the following criteria:

- Life imprisonment or the death penalty shall not be imposed on juvenile offenders (Penal Code, arts 35, 35, 69(5));
- Defence counsel shall be provided free of charge in cases where juvenile offenders and their representatives have not selected their own counsel (Criminal Procedure Code, art 305);
- The minimum age of criminal responsibility is 14 (Penal Code, art 12);
- Penalties imposed on juvenile offenders are lighter than those imposed on adult offenders for the corresponding crime (Penal Code, arts 69, 72-77);
- The participation of families and related organisational representatives is required while dealing with juvenile offenders (Criminal Procedure Code, art 305);
- The composition of the jury panel hearing juvenile offenders should include a juror who is a teacher or youth union cadre (Criminal Procedure Code, art 307);⁸
- The arrest or detention of people must comply with the law; all forms of coercion and corporal punishment are forbidden; as soon as the arrest or

⁶ Persons aged between 12 and 16 who commit acts with signs of crime, and persons aged between 16 and 18 who repeatedly commit acts of petty theft, gambling, or causing public disorder, shall be educated at communes or sent to reformatories, according to the Law on the Handling of Administrative Violations of 2012.

⁷ There are also military courts to address criminal cases related to the armed forces, [see: Law on Organization of the People's Courts 2002: arts 2, 34](#).

⁸ In Vietnam, teachers or youth union cadres are believed to have knowledge about, and experience of working with, children.

detention of juveniles takes effect, their families must be notified (Criminal Procedure Code, arts 6, 303(3));

- It is forbidden to keep juvenile offenders together with adult offenders (Criminal Procedure Code, art 308; Law on Execution of Criminal Judgments, art 27(2b));
- Involved persons, including juveniles, have the right to appeal against and complain about court judgments and relevant decisions (Criminal Procedure Code, arts 50, 51, 326; Law on Execution of Criminal Judgments, art 150).

Despite these provisions, Vietnam's laws and mechanisms for dealing with children in contact with the justice system still have serious shortcomings, as shown in the next section.

Shortcomings in Vietnam's Juvenile Justice System

The shortcomings of Vietnam's juvenile justice system are obvious. It has no separate laws, procedures and authorities specifically applicable to juvenile offenders; and no adequate measures to support child victims and witnesses. The most significant gaps in Vietnam's current laws include the following.

The principle of 'the best interests of the child' (CRC, art 3) has not been enacted into criminal law. Both the Penal Code and Criminal Procedure Code, which are regarded as the basic laws dealing with criminal justice, fail to mention this principle.

Child victims and witnesses seem to be ignored. They receive less protection than is recommended by international standards. In Vietnam, child victims and witnesses have similar rights and obligations to adults, with few exceptions. The most noticeable difference is that when statements are taken from victims and witnesses aged less than 16 years, their representatives or teachers must be invited to attend (Criminal Procedure Code, arts 135, 137).

The prevention of juvenile delinquency has not received adequate attention. Among thousands of legal documents and programs concerning criminal justice, there are few documents focusing on preventing juvenile delinquency. There is no comprehensive program with fundamental principles, general prevention and social policy as indicated in the Riyadh Guidelines. These programs do not usually actively address factors that can result in juveniles breaking the law but rather emphasise the last stages of this process, when juveniles are at social risk and likely to breach the law, or when they have already broken the law. For example, in the Plan for the Prevention of Juveniles Committing Serious Crimes of 2012, social prevention is mentioned as a slogan, while the subject of professional prevention by the police is more detailed, mentioning keeping a close watch on the suspect, strengthening patrols, control and prevention of juvenile gangs, and establishing special projects to handle serious cases (part II/2).

Diversion, intervention and restorative justice – all important in international standards – are not officially mentioned in the law in Vietnam at all and are, indeed, new or unfamiliar in Vietnam (Bo Tu Phap and UNICEF 2012a). There are, for example, no corresponding terms in Vietnam's legal documents and judicial practice and there are no judicial programs focusing on intervention or restorative justice. The few provisions of the current law that do contain some reference to intervention include the following:

The handling of juvenile offenders aims mainly to educate and help them to recognise their faults, redress the wrongs, and develop in a healthy way

(Penal Code, art 69(1); Law on Child Protection, Care and Education, arts 36, 56(1)).

Juvenile criminals may be exempt from penal liability if they commit less serious crimes or serious crimes that cause no great harm and involve many extenuating circumstances; and if they are accepted for supervision and education by their families, agencies and organisations (Penal Code, art 69(2)).

In practice, cases that could include interventions are those where criminal proceedings have been initiated against juvenile offenders, and then halted because of changed circumstances. Juvenile offenders have, by this stage, usually already been interrogated and deterrent measures applied. Then, believing the case has fully satisfied the requirements of the Penal Code (arts 25, 54, 69(2)), the procedure-conducting body decides to exempt juvenile offenders from criminal liability and stop the case. In such cases, judicial bodies play a decisive role, while social organisations are usually only involved passively.

There is no distinction between the time periods for dealing with juvenile offenders and those that apply in adult cases. In Vietnamese law, the time limit for investigating, prosecuting and adjudicating juvenile offenders is the same as for adults, depending on the seriousness and complication of the crime. This is not in compliance with international standards, which require that the time period for handling juveniles should be much shorter than for adults (General Comment No 10: par 51–52).

The protection of juveniles' privacy under Vietnamese law is also far from the international standards set out in the CRC and other relevant international instruments. In fact, the Criminal Procedure Code has no article clearly stipulating the protection of privacy of juveniles involved in judicial proceedings. Article 307 of this code provides an option that the court may decide on closed trials for juvenile offenders (there are three kinds of trial available in Vietnam: closed, public and mobile trials).⁹ This option of closed trial is also restated in the Joint Circular on Guiding the Implementation of the Criminal Procedure Code for Juveniles,¹⁰ which adds two general statements concerning the protection of children's privacy:

- All procedural activities related to juveniles must be carried out in an environment convenient for the confidentiality of their personal lives, honour and dignity (art 3(3));
- Mobile trials of juvenile cases shall not be carried out, except in cases of necessity for legal education and dissemination and crime prevention (art 11(2)).

These new regulations have not been successfully realised, and are not adequately supported by law enforcement. [The Plan for the Prevention of Juveniles Committing Serious Crimes of 2012 \(part II/2\)](#) still states that [organising mobile hearings should be an important task, and court hearings of juvenile offenders are seldom conducted behind closed doors in practice](#). According to a Deputy Prosecutor-General of the Supreme People's Procuracy, actual adjudication in Vietnam is almost always public

⁹ Mobile trials are not conducted in a court-room but either in the place where the crimes happened, or in schools, markets, stadiums or other public places that the public can easily attend. This is regarded as a good method for disseminating information and educating the public about the law and preventing crime, see [Toa an Nhan dan Toi cao, 2010: 119-120; Le HT, 2012:147](#).

¹⁰ Article 11(2) of the Joint Circular 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXH on Guiding the Implementation of Several Provisions of the Criminal Procedure Code for Juveniles Involved in Legal Proceedings.

– including even in rape cases where both offenders and victims are juveniles. The public and journalists are free to attend, and to write articles and reports which include juvenile offenders’ identifying information (Le, 2012: 147). The [statistics of the Supreme People’s Court](#) from 2007 to 2012 show that the number of juvenile cases heard in mobile trials in each of these years was 207, 196, 158, 118, 165 and 340 respectively. These numbers account for about five to seven per cent of all cases involving juvenile offenders. The disclosure of juveniles’ identifying information happens not only at trial, but also during the earlier stages of investigation and prosecution. It is often easy to find identifying information, with photographs of juvenile offenders, and sometimes child victims, published on the Internet and in newspapers.

It can be said that the contemporary practice of mobile trials in Vietnam in cases involving juveniles is completely contrary to international standards. These trials do not protect children, but, rather, can cause stigma, adversely affecting their psychology and recovery.

Table 1: Number of Court Cases Handling Juvenile Offenders & Number of Juvenile Offenders: 2007-2012

Years	Court cases handling juvenile offenders		Juvenile offenders
	Total	Mobile trials	
2007	2689	207	3747
2008	2744	196	3900
2009	2722	158	3710
2010	2582	118	3418
2011	2355	186	3243
2012	4557	340	6180

Source: Supreme Peoples’ Court’s Annual Statistics 2007-2012

Researchers, the government and the Communist Party of Vietnam share the view that law enforcement is not always efficient, pointing to gaps between regulations and their implementation (Bui, 2003: 28; Resolution No 49-NQ/TW: part I/1; Nicholson and Nguyen TD, 2007: 220; Ha, 2007;¹¹ Vietnam 2009: par 72). This phenomenon is not peculiar to juvenile justice. It has been argued that Vietnam’s domestic law contains provisions complying with international standards in juvenile justice but that the implementation seems formalistic (Pham, 2012: 40). In the next section, I analyse some notable examples concerning the right to defence and the procedures and personnel applicable to juvenile cases.

The right to defence of juvenile offenders

Recent studies have reported that in many cases juvenile offenders and their families wish to receive legal assistance but have no understanding of the mechanisms for doing so (Hoi Luat Gia Vietnam and UNICEF, 2012: 82). When provided with defence counsel free of charge they usually accept the recommended counsel immediately, without any idea of their right to refuse or change their appointed counsels (UNDP, 2012a: 51).

The common complaint that lawyers are typically not welcomed by procedure-conducting bodies is often justified. Many lawyers have experienced difficulties while requesting certification, contacting offenders held in custody, or copying relevant documents in case files (Tran VB, 2006: 201-202; Pham MT, 2007: 28; Nguyen VH, 2010: 64, Booth, 2012: 33-34; UNDP, 2012b: 36-39). One lawyer reported that he

¹¹ Ha (2007) includes comments on behalf of the Minister of Justice.

had to apply for seven counsel certificates in the course of the defence of a single offender in one case (UNDP, 2012a: 39). Lawyers' views and recommendations have not been evaluated adequately, and have often been ignored by judges and procedure-conducting bodies.¹² These complaints may, however, come from the lawyers or counsel who have attended cases when selected by offenders. In these cases, lawyers usually execute their tasks with real enthusiasm and responsibility commensurate with the remuneration received from their clients and for the improvement of their own reputation and business. By contrast, it is reported that lawyers appointed pursuant to a request by procedural bodies are treated more favourably by officials (UNDP, 2012a: 51). This may be explained by the fact that in mandatory cases, procedural bodies also need lawyers' attendance to ensure the proceedings are conducted properly according to the law.

In juvenile cases, if offenders and their representatives have not selected defence counsel, the procedural bodies have to request a counsel to defend the juveniles unless they refuse appointed counsel (Criminal Procedure Code, arts 57(2), 305). There is a very high risk, however, that procedure-conducting bodies may recommend to offenders and their families that they refuse defence counsel; or that these bodies carry out the duty of requesting counsels in a perfunctory way (Children's Legal Centre, 2010: 44, 47-8; Booth, 2012: 34; Phan, 2012: 179). In practice, most counsel or lawyers participating in juvenile cases are appointed based on requests from procedure-conducting bodies. As noted above, the appointed counsel enjoy the favour of procedure-conducting bodies because their participation is seen as not only defending juvenile offenders but also 'helping' procedure-conducting bodies to avoid violations of the law and avoid the exclusion of wrongfully-obtained evidence. The absence of defence counsel when trying juvenile offences can be considered a serious violation of the law, sometimes leading to the return of case files for additional investigation or even re-trial.¹³ TQ Pham reveals that in 2007, when the guaranteed right to defence counsel was strictly observed, there was a storm of returned files and cancelled first-instance trials on the grounds that additional investigation or re-investigation was required. In many cases, investigating bodies implored counsel to sign the minutes of interrogation (Pham TQ, 2008: 36, 39).

Regarding the responsibilities of appointed counsel, it is said that they do not always endeavour to find the best evidence to protect the offenders they represent (UNDP, 2012a: 51-52). Some lawyers have neither experience nor knowledge related to the issues addressed (UNDP, 2012b: 41). Some findings taken from relevant surveys show that defence counsel sometimes sign declarations and supplied minutes of interrogation without having had real participation in the proceedings so recorded (UNDP, 2012a: 57; Phan, 2012: 179). Furthermore, many appointed lawyers say nothing during the trial (Children's Legal Centre, 2010: 44) or have an inadequate understanding of the case due to having not studied the case files (UNDP, 2012a: 47).

In short, the implementation of juvenile offenders' rights to defence seems inefficient and formalistic. Juvenile offenders and their legal representatives are not well-informed about their rights; appointed counsel are less than enthusiastic in

¹² See Tran, 2006; Assistance for the Implementation of Vietnam's Legal System Development Strategy to 2010, 2006: 262; Nguyen TD, 2007: 7.

¹³ Articles 57(2), 168(3), 179(1c), 250, 305 of the Criminal Procedure Code; art 4(2b of Joint Circular 01/2010/TTLT-VKSNDTC-BCA-TANDTC on Guiding the Implementation of the Provisions of the Criminal Procedural Code on Returning the File for Additional Investigation.)

conducting their duties; and procedure-conducting bodies sometimes abuse their power.

Procedures and special personnel in cases involving juvenile offenders

The Criminal Procedure Code (art 302(1)) requires judicial staff conducting juvenile cases to possess knowledge of juvenile psychology and the prevention of juvenile delinquency, but this does not happen in practice. Though Vietnam has recently received some support from international organisations for training personnel, the Supreme Peoples' Court has admitted that, first, in Vietnam there are no professional judicial staff for handling juvenile cases; and, second, that in the entire court system there is not a single judge specialising in juvenile trials (Toa an Nhan dan Toi cao and UNICEF, 2012: 40).

There are also problems in the implementation of special procedures for addressing juvenile cases. Professor VD Tran, Deputy Chief of the Supreme Peoples' Court, admits that there is no distinction in procedures between juvenile cases and adult cases. In actuality it is not practical to require a teacher or youth union cadre to sit on the trial panel (Tran VD, 2012: 120).

The collection of data concerning juveniles in contact with the judicial system also needs to improve. Currently, statistics on child victims, witnesses of crime and juvenile offenders subjected to pre-trial deterrent measures (arrest, custody or temporary detention) are not adequate. All procedure-conducting bodies are competent to apply deterrent measures when dealing with juvenile offenders, and regularly do so, but no agency has reliable nationwide statistics. It is, therefore, hard to make a plausible judgment about the application of deterrence measures against juvenile offenders, and the situation of child victims and witnesses of crime. So, the construction of specific programs to improve the quality of child protection is very difficult. Weaknesses in the collection and storage of information relating to children are constantly repeated in comments and research into child rights in Vietnam. For example, UNICEF advises that Vietnam needs to improve the quality, reliability, accuracy and understanding of data, evidence and indicators related to children's rights.

Data remains a challenge in Vietnam in many sectors. There is a need to significantly improve routine data management systems in the relevant line ministries, from local up to national level, and to support the use of data and evidence in policy-making. This was also a major recommendation of the CORC (UNICEF, 2011: 297).

Analysing the CORC's observations on Vietnam's implementation of the CRC it can be seen that suggestions regarding juvenile justice have been emphasised and repeated over the years. For instance, in 2003 the COCR recommended that Vietnam should

- ensure the full implementation of juvenile justice standards, in particular articles 37, 40 and 39 of the Convention, as well as the Beijing Rules and the Riyadh Guidelines;
- consider adopting a separate legal code for juvenile justice and establishing a system of juvenile courts;
- improve conditions in juvenile detention centres and ensure that deprivation of liberty is used only as a measure of last resort;
- expedite the development of a system for the provision of appropriate rehabilitation and reintegration services and increase the number of professional social workers providing such services to young offenders;

- ensure that all children accused of having violated the law have legal counsel or other appropriate assistance;
- request technical assistance in this regard from, inter alia, the Office of the United Nations High Commissioner for Human Rights and other members of the United Nations Coordination Panel on Technical Advice and Assistance on Juvenile Justice (CORC, 2003: par 54).

Several of these recommendations appeared in Vietnam's initial report, in 1993 (par 8), and were recommended in response to the third and fourth report in 2012 (pars 10, 72–73).

The above analysis demonstrates that Vietnam has not reached full compliance with international standards in juvenile justice. Shortcomings include not fully satisfying international standards in domestic laws; a large gap between regulations and practical implementation; and failing to collect the necessary data. These shortcomings demonstrate a need for further reform of the juvenile justice system in Vietnam.

A Proposal for Juvenile Justice Reform

Juvenile justice, as the International Network on Juvenile Justice (2002) notes, is not a single separate system but is comprised of different parts, including courts, police, prisons, and care services, all woven together. In Vietnam, shortcomings in juvenile justice range from the law itself to its enforcement and evaluation. A comprehensive approach is therefore needed to remedy the problems. In other words, Vietnam should reform its legal system, rebuild institutions, provide support programs, train judicial staff and improve connections between duty-bearers, lawyers, social workers and related organisations. Reforming juvenile justice is a multifaceted and complex task, demanding financial, technical, and human resources. In its current circumstances, Vietnam cannot successfully conduct all the justice reforms it needs in a short time. What is needed instead is a good plan with clear priorities to ensure implementation over time.

Recently Vietnam introduced strategies on judicial reform and established a Judicial Reform Steering Committee with responsibility for planning, coordinating and directing the implementation of judicial reform tasks.¹⁴ The key documents include three resolutions¹⁵ issued by the Communist Party of Vietnam.

These resolutions set out the Vietnamese government's targets for improving the legal and judicial system after a review of its shortcomings and the means by which they plan to achieve them. The goal by the year 2020 is to construct a transparent and feasible legal system and an effective and clear judiciary with the objective of building a socialist state of the people, by the people and for the people. These documents have become not only guidelines for the State in reforming the system of law and judicial institutions but also criteria for assessing the performance of the legislature and judiciary. They are the foundation for the discussion of socialist law, justice system, the law-based state and judicial reform.¹⁶

¹⁴ The Committee's members consist of the National President, the leaders of the SPS, Supreme People's Procuracy, Ministry of Justice, Ministry of Public Security, Ministry of Defence and so forth. See art 1 of the Resolution No 08-NQ/TW: III/6; Decision No 39-QD/TU.

¹⁵ Resolution No 08-NQ/TW dated 02 January 2002 on Several Key Tasks in the Judicial Sector in the near future; Resolution No 48-NQ/TW dated 24 May 2005 on the Strategy for Development and Improvement of Vietnam's Legal System to 2010 and Orientation to 2020; Resolution No 49-NQ/TW dated 02 June 2005 on Judicial Reform Strategy to 2020.

¹⁶ See Hoang, 2006; Nguyen TL, 2008; Nguyen HT, 2009; Nguyen KC, 2011.

In Vietnam, the perception and employment of legal terms related to the 'judicial' (*tu phap*), such as 'judicial power' (*quyen tu phap*), 'judicial activity' (*hoat dong tu phap*) and 'judicial system' (*he thong tu phap*) do not have the same meaning as those of other countries. They are terms connected not only to the court but also to the procedural bodies that deal with investigation, prosecution and execution of court judgments (Nguyen NP, 2004: 26; Nicholson, 2005: 160; Nguyen DD, 2009: 38; Pham VH, 2009: 10-11). Nevertheless, the court and its activities are still the centre of the judicial system and judicial activities (Nguyen NP, 2004: 26; Nguyen DD, 2009: 38) and the court is the sole authority that declares a person guilty and imposes punishment. The other procedural bodies' activities are to prepare for the court's adjudication and implement the court's decisions.¹⁷ Therefore, reforming the court system and adjudication are recognised as the most important tasks for judicial reform in Vietnam (Nguyen NP, 2004: 26; Nguyen DD, 2009: 38). The critical importance of reform is also emphasised in Vietnam's official strategies on judicial reform:

Vietnam strives for a judiciary with integrity, strength and democracy, and judicial activities (especially judgments) conducted efficiently. Judicial reform shall be conducted with a focus on enhancing and perfecting the court's organisation and activities. The other agencies shall be reformed in a way compatible with the court (Resolution No 49-NQ/TW: parts I/1, II/1, II/2.2).

In the sphere of justice reform, juvenile justice is also much discussed in Vietnam. There is a common belief that the juvenile system should be reformed and authors argue that a juvenile court should be established soon (Le, 2012; Nguyen HH, 2012; Trinh, 2012). This would lead to significant changes not only in adjudication but also in the investigation and prosecution of juvenile cases. It would also assist Vietnam to correct shortcomings and contribute to the fulfilment of its obligations under the CRC (Pham TTN, 2012: 45).

Prospects for the Establishment of Juvenile Courts in Vietnam

It has been noted above that Vietnam has been repeatedly advised to improve its juvenile justice system by the CORC and international organisations working with children. These organisations, especially UNICEF and UNDP, have provided Vietnam with valuable support in the expectation of the establishment of juvenile courts.¹⁸

The shortcomings of the current justice system in its treatment of children have also been acknowledged by the government, judicial staff and a number of domestic researchers, as mentioned above. They share the idea that Vietnam should create specialised courts for dealing with juveniles (Children's Legal Centre, 2010: 57; Le, 2012: 146; Nguyen HH, 2012; Toa an Nhan dan Toi cao and UNICEF, 2012: 113). A recent survey shows 91 per cent of participants¹⁹ agree with a proposal to establish specialised courts for dealing with juveniles (Toa an Nhan dan Toi cao and UNICEF, 2012: 68).

¹⁷ Vietnam is currently reviewing the Constitution of 1992. The draft of a new Constitution (art 107), which has been put to a referendum, provides that the Court is the adjudicating body of Vietnam, and that it exercises judicial power, see: <http://duthaonline.quochoi.vn>.

¹⁸ Recently UNICEF and UNDP have supported many projects conducted by the Supreme Peoples' Court and Ministry of Justice concerning the establishment of juvenile courts.

¹⁹ The participants in this survey include people whose careers relate to juvenile justice (judicial staff, lawyers, social workers) and juvenile offenders, child victims, witnesses, and their representatives, see: Toa an Nhan dan Toi cao and UNICEF, 2012: 63.

The Supreme Peoples' Court's General Report on the Theoretical and Practical Rationale of the Need for Establishing Specialised Courts for Juveniles in Vietnam (2012) (hereafter 'Report on Establishment of Juvenile Courts') describes the handling of juvenile cases and provides basic information on the establishment of juvenile courts in Vietnam. It states that Vietnam is currently undertaking reform of the justice system with a focus on courts and adjudication. It is proposed to establish a four-tier court system based on jurisdiction:

- Regional courts are to be organised in one or several districts, having authority for first-instance trials as do the current district courts
- Appellate Courts (Provincial Courts) are to be organised in each province, having authority for first-instance and appellate trials;
- High Courts are to be organised in several provinces, having authority for appellate trials and the review of legally valid judgments;
- The Supreme Peoples' Court is to be responsible for recapitulating court hearings, guiding the consistent application of the law, developing case law and reviewing legally valid judgments in certain cases (Resolution No 49-NQ/TW: part II/2.2; Nguyen VQ, 2010: 67).²⁰

The draft of a new Law on the Organisation of People's Courts is now in preparation with a four-tier court hierarchy contemplated, including the Supreme Peoples' Court, high courts, provincial courts and regional courts.²¹

The current situation is thus conducive to the establishment of juvenile courts in Vietnam. Given the traditions and current circumstances of Vietnam, I would suggest constructing the juvenile court as a specialised court, similar to the criminal, civil, labour, economic and administrative courts in the People's Court system at present. In the new system, specialised courts should be organised as departments in the People's Courts at both regional and provincial court levels. Juvenile courts would be responsible for the first-instance and appellate trials of all juvenile cases.

If this suggestion is followed, the juvenile court will be the newest unit compared with the existing criminal, civil, labour, economic and administrative courts. In addition to the common requirement to improve the effectiveness of courts as indicated in Resolution No 49-NQ/TW, juvenile courts would demand more specialised personnel and facilities. Judicial staff working in the juvenile court should have not only professional legal knowledge in their field (similar to those working in other courts) but also an understanding of, and skills in, the psychology and education of juveniles. The minimum standard for hearing juvenile cases requires child-friendly courtrooms suitable to the level of maturity and development of children, waiting rooms separated from adults for juvenile offenders, and places for child victims and witnesses. In addition, machinery and equipment for recording interrogations and showing relevant recorded data is also needed in the cases where it is necessary to limit the harmful exposure of child victims and witnesses to offenders, or to reduce encounters between juvenile and adult offenders. These facilities are not available in the courts at present, and need to be prepared.

Further, in order that juvenile courts can operate effectively, other related institutions and processes also need to be reformed. For example, child-friendly investigations should be conducted; a lack of lawyers in rural, mountainous and isolated areas that leads to delays in handling cases (as indicated in a Ministry of

²⁰ Nguyen presents conclusions on the behalf of the Judicial Reform Steering Committee.

²¹ This is the draft submitted to the Justice Council of the SPS in February 2013.

Justice's report [2012:15–16]) should be quickly improved; and programs for appropriate interrogation should be established.

This would provide the potential for progress in the future. Harding and Nicholson, reflecting on the experience of establishing new courts in Asia over the last thirty years, comment that

[t]he ordinary courts are slow, expensive, lacking in competence and resources. A special court can be designed more effectively to deal with a particular policy objective... (Harding and Nicholson, 2010: 22).

When constructing a plan for juvenile courts, Vietnam should, of course, look at international standards in juvenile justice, but it should also study and draw lessons from other countries' juvenile courts. For example, Vietnam can learn from Australia, Romania and the Philippines regarding child-friendly juvenile courts. These countries all have promising models, as noted by the UNICEF Regional Office for South Asia (2006: 128-129; 2007: 57). Australia's Aboriginal Juvenile Court conducts 'procedures with as little formality and technicality as possible' and changes the physical setting to 'create a more informal and culturally relevant environment'. The Lasi Juvenile Courthouse in Romania has a separate Juvenile Courthouse to hear all juvenile cases, with teams of specialists for processing and judging. The Philippines Court Appointed Special Advocates have a good mechanism for child advocates to provide juvenile offenders with needed services.

There is, however, no single, ideal model of juvenile courts in any country that Vietnam should copy for two main reasons. First, no current juvenile court satisfies all the requirements of the CRC and relevant instruments concerning justice for children. This recognition is drawn from the CORC's observations on implementing the CRC and many reliable studies on juvenile justice worldwide.²² Second, Vietnam's socio-economic and cultural circumstances are not the same as other countries. A good model from other countries can not be guaranteed to succeed in Vietnam.

In short, there will be difficulties in establishing juvenile courts in Vietnam, but it is feasible to proceed. It would certainly be a good way to narrow the gap between Vietnam's current situation and international standards in juvenile justice, thus fulfilling Vietnam's obligations under the CRC.

Possible Effects of the Establishment of a Juvenile Court on the Implementation of Vietnam's Obligations under the CRC

Generally, a reasonable and persuasive approach to the evaluation of the effectiveness of a new court is based on the court's legitimacy with constituent or multiple stakeholders' attitudes and on the context of court reform, rather than the State's attitude to the court and pre-established criteria for the court (Harding and Nicholson, 2010: 6). However, this approach may not be completely appropriate when the new court has not yet been established and the court system is undergoing reform. Predictions in these circumstances should be based on the goals set for the new court.

It is impossible to say exactly what effects a juvenile court will have if it is established in Vietnam. However, some guidance on its likely effects can be obtained from the current context by reference to the goals set out in the *Report on the Establishment of Juvenile Courts*. Throughout this document, a major goal and the

²² See, for example, Nikhil and Wong, 2006; UNICEF Regional Office for CEE/CIS, 2008; and UNICEF Regional Office for South Asia, 2006.

most important function of the establishment of juvenile courts is said to be to ensure 'the best interests of the child'. This is the core spirit and objective of the CRC, the Optional Protocols to the Convention, and other international legal instruments related to children's rights, including the Beijing Rules, Riyadh Guidelines, Havana Rules and the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime.

The *Report on the Establishment of Juvenile Courts* also clearly states the criteria for the establishment juvenile of courts:

- The court shall be conducted in a child-friendly environment;
- The living circumstances and environment of juvenile offenders shall be considered while dealing with their cases;
- The sending of juveniles to rehabilitation centres is only used as a last resort and for the shortest appropriate period of time;
- The prevention of juvenile delinquency and child abuse shall be set out in the court's activities;
- Family programs with families and social organisations' involvement shall be created for the purpose of juveniles' recovery and reinterrogation (Toa an Nhan dan Toi cao and UNICEF 2012: 109)

The first three of these criteria as stated in the CRC (arts 40(4); 37(b)); the Beijing Rules (rules 5, 17/1/a, 19) and repeated in General Comment No 10 (2007), which provide fundamental principles for handling children breaking the law and for the application of measures for restricting or depriving juveniles of their liberty. If the juvenile court is to be established with these goals, programs focusing on children's living environments and circumstances need to be implemented. Once they are operating effectively, Vietnam will be able to meet several of the standards for juvenile justice set forth in the CRC and relevant international legal instruments.

The last two goals of preventing juvenile delinquency, managing interventions/diversion, applying restorative justice and enabling services for social reintegration could also be meaningfully addressed. At present, they are not given adequate attention. Criminal prevention has never been included in the annual plans of the courts. The court has neither particular programs nor proactive activities to prevent crime. Commonly, the main responsibility for criminal prevention, including prevention of children breaking the law, belongs to the police. The police develop programs and then conduct projects and organise conferences to report on these programs. In such programs, the court usually has no active role. It simply participates in conferences, gives advice and sometimes presents information related to trying juvenile criminals. For example, during the program on preventing and combating child abuse and juvenile crime in the period 2006–2010 (named 'Project 4'), the court merely attended formal meetings, where the police (General Police Department for Preventing and Combating Crime) presented general information about the plan and its results (Tong cuc Canh sat Phong-Chong Toi pham, 2012).

At the same time, interventions and restorative justice are unfamiliar concepts in Vietnam. As mentioned, there are no corresponding terms in Vietnam's legal documents and judicial practice, and no judicial programs that focus on intervention or restorative justice. If the court system actively plans specialised programs to prevent children breaking the law and formally recognises and applies interventions and restorative justice, there will be need to be significant changes in the overall system of justice for children. If the questions of interventions and restorative justice were addressed, Vietnam's juvenile justice system would approach the requirements

of the Riyadh Guidelines on the prevention of juvenile law violations; the CRC (articles 40(3b), 40(4) and 39) on enhancing treatment of child offenders without resorting to formal judicial proceedings, and promoting recovery and reintegration for child victims.

It can be also supposed that establishing a juvenile court would promote better protection for children's rights on the part of related institutions, including investigating and prosecuting bodies, bar associations and other social organisations. Once a juvenile court is established, corresponding agencies responsible for investigation and prosecution will be enhanced. The operation of juvenile courts will require child-friendly investigation, prosecution and support from social associations – especially bar associations. Conducting child-friendly trials in the courts would have no meaning without these.

Furthermore, once the juvenile court is established, data reflecting children's rights, especially information concerning children in contact with the justice system, can be collected fully and in more detail. When the juvenile justice system operates separately, input and output statistics and other related data can be collected independently, following new, more suitable, criteria. Once there are reliable statistics, they can be referred to in initiating, developing and conducting programs for children breaking the law, for child victims and for witnesses of crimes.

Conclusion

Since the ratification of the CRC, Vietnam has made remarkable efforts to implement its obligations. Within the judicial sector, Vietnam's regulations have recognised a number of the fundamental rights of the child in conflict with the law as required by the CRC and relevant international standards. Nevertheless, there still remain significant shortcomings in mechanisms for the protection of children in contact with the justice system, including child offenders, child victims and child witnesses of crime. There are no separate laws, procedures and authorities specifically applicable to juvenile offenders. The prevention of juvenile delinquency and measures for intervention and restorative justice are not formally prescribed by the law. Child victims and witnesses of crime are entitled to very few rights in comparison with those enshrined in the CRC and international laws. Further, the implementation of regulations in line with international standards has been found to be ineffective and somewhat formalistic. I argue that Vietnam's current judicial system inadequately deals with matters involving children; and a specialised court for children is needed to correct this.

Vietnam has been conducting judicial reform with the expectation of establishing a transparent, feasible and effective legal system and judiciary, and the reform of the court system and courts' activities is central to this process. Other related agencies should be reorganised in a way compatible with the court. The reconstruction of the organisation and authority of courts has therefore been considered and it is now proposed to replace the current three-level court system by a four-tier court hierarchy. This situation is favourable for establishing specialised juvenile courts. To do so would, however, require the improvement of relevant legal documents, facilities and staff training. The organisation and operation of relevant institutions, including investigating and prosecuting bodies, and lawyers' associations also need improvement to better comply with court activities. Once a juvenile court is set up and operates efficiently, the protection of children regardless of whether they are child offenders, victims or witnesses in Vietnam will gradually advance, and then begin to approach international standards in juvenile justice. Subsequently,

children's rights in general will increasingly be better protected. In other words, the establishment of effective juvenile courts will grant Vietnam the ability to better fulfil its responsibilities under the CRC.

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